



July 30, 2004

VIA ELECTRONIC FILING

Marlene H. Dortch, Secretary
Federal Communications Commission
Office of the Secretary
445 12th Street, SW
Washington, DC 20554

**Re: BellSouth Emergency Petition for Declaratory Ruling and Preemption of State
Action; WC Docket No. 04-245**

Dear Ms. Dortch:

Attached are comments of the Association for Local Telecommunications Services ("ALTS") for filing in the above-captioned proceeding.

Sincerely,

/s/

Teresa K. Gaugler

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
BellSouth Emergency Petition for Declaratory)	WC Docket No. 04-245
Ruling and Preemption of State Action)	
)	

**COMMENTS OF THE
ASSOCIATION FOR LOCAL TELECOMMUNICATIONS SERVICES**

The Association for Local Telecommunications Services (“ALTS”) hereby files its comments in the above-referenced proceeding in response to the Commission’s Public Notice¹ regarding BellSouth’s petition for declaratory ruling and preemption of a Tennessee Regulatory Authority (“TRA”) order.² BellSouth asserts that the TRA exercised authority reserved exclusively to the Commission and violated the Telecommunications Act of 1996 (“the Act”), Commission orders, and federal precedent when it established rates for switching provided pursuant to section 271 of the Act. ALTS takes no position on the underlying dispute between ITC^DeltaCom and BellSouth regarding rates, terms and conditions for switching not provided pursuant to section 251. ALTS disagrees, however, with BellSouth’s contention that the TRA or any other state commission lacks authority to ensure ongoing BOC compliance with the competitive checklist of section 271. The Commission must reject BellSouth’s claims and uphold the states’ rights to enforce these provisions of the Act.

¹ *Pleading Cycle Established for Comments on BellSouth’s Emergency Petition for Declaratory Ruling and Preemption of State Action*, Public Notice, WC Docket No. 04-245 (rel. July 6, 2004).

² BellSouth Emergency Petition for Declaratory Ruling and Preemption of State Action, WC Docket No. 04-245 (filed July 1, 2004) (“BellSouth Petition”).

I. The Commission and State Commissions Share Dual Responsibility for Ensuring BOC Compliance with section 271 of the Act.

In the first order approving a Bell company application for long distance authority, the FCC clearly set out the ongoing responsibility of the state commissions for ensuring BOC compliance with the competitive checklist after entry into the long distance market. While noting that Congress authorized the FCC to enforce section 271 to ensure continued checklist compliance, the *New York 271 Order* specifically endorsed state commission authority to enforce commitments made by Verizon (then Bell Atlantic) to the New York Public Service Commission. The FCC stated that:

Complaints involving a BOC's [Bell Operating Company's] alleged noncompliance with specific commitments the BOC may have made to a state commission, or specific performance monitoring and enforcement mechanisms imposed by a state commission, should be directed to that state commission rather than the FCC.³

Indeed, the FCC noted "with approval" the fact that the New York Performance Assurance Plan ("PAP") "will be enforceable as a New York Commission order."⁴ Each and every subsequent FCC order granting BOC long distance entry reached the same conclusion: state commissions are fully empowered to ensure BOC compliance with the competitive checklist after section 271 application approval.

State commission authority to ensure BOC compliance with the competitive checklist necessarily includes the authority to ensure BOCs continue to provide access to checklist items at rates, terms, and conditions that comply with the Act. As to rates, the state commission in each

³ *Application by Bell Atlantic New York for Authorization Under section 271 of the Communications Act to Provide In-Region, InterLATA Service in the State of New York*, Memorandum Opinion and Order, 15 FCC Rcd 3953, ¶ 452 ("New York 271 Order").

⁴ *Id.* at n. 1353.

section 271 proceeding evaluated BOC rates for checklist items, pursuant to methodology established by the FCC. The Supreme Court in *Iowa Utilities Board* confirmed the dual role of the FCC and state commissions in pricing network elements. As the Supreme Court stated:

[Section] 252(c)(2) entrusts the task of establishing rates to the state commissions.... The FCC's prescription, through rulemaking, of a requisite pricing methodology no more prevents the States from establishing rates than do the statutory 'Pricing standards' set forth in 252(d). It is the States that will apply those standards and implement that methodology, determining the concrete result in particular circumstances.⁵

Thus, the FCC applied this dual-jurisdictional scheme to the section 271 process: state commissions review, and in many cases issue orders establishing, the rates BOCs charge for section 271 checklist obligations. That process played out before the TRA in the instant proceeding, as it has in every other state that has an open pricing docket or has concluded such dockets with a pricing order. That process is in no way altered by the Commission's holdings in the *Triennial Review Order*.

The Commission has found that section 271 access obligations for network elements apply even where an element has been removed from the section 251(c)(3) unbundling list. The Commission concluded in its *Triennial Review Order* that the Act establishes an "independent and ongoing access obligation" for BOCs to provide access to checklist items under section 271(c)(2)(B) that is separate and distinct from an ILEC's unbundling duties under section 251.⁶ The Commission determined the terms and conditions of such access would be subject to

⁵ AT&T Corp. v. Iowa Utils. Bd., 525 U.S. 366, 384 (1999).

⁶ *Triennial Review Order* ¶ 654.

sections 201 and 202 of the Act, requiring that they be just, reasonable and non-discriminatory.⁷

BellSouth would have the Commission believe that the state commissions' involvement in determining ongoing BOC compliance with the rates, terms and conditions of access to section 271 checklist requirements abruptly ends if an element that is specifically delineated in the competitive checklist, and also unbundled pursuant to section 251(c)(3), is phased out by the FCC from the latter statutory provision. BellSouth ignores the obvious fact that, notwithstanding the Commission's interpretation of section 251 obligations, the Commission's action in no way changes the obligations in the competitive checklist. Indeed, the Commission's action in the *Triennial Review Order* actually confirms the checklist obligations. Under BellSouth's theory, state commissions that have conducted extensive arbitration proceedings and have developed expertise regarding the appropriate terms and conditions of access should be removed from the regulatory process because the FCC makes an unrelated determination that certain elements may not satisfy the "necessary and impair" test. For example, BellSouth argues that commissions that have conducted detailed pricing dockets to determine cost-based prices for UNEs must no longer have jurisdiction to review and determine the just and reasonable prices for those elements when they are provided under section 271. BellSouth provides no credible legal support for this position, nor does it attempt to justify this as the most prudent course of action, and the Commission should reject its petition outright. State commissions routinely review and enforce interconnection agreements, ILEC merger conditions, and state regulatory requirements, and they are also an important partner to the FCC in ensuring ongoing BOC compliance with the competitive checklist.

⁷ *Id.* ¶ 656.

In its petition, BellSouth makes repeated vague references to declarations by the Commission regarding the states' lack of authority to regulate under section 271; however, it provides no concrete examples of such statements.⁸ Specifically, BellSouth claims that "the Commission has held that as a matter of national policy, it retains exclusive jurisdiction to regulate pursuant to section 271," yet it provides no cite for that statement. Instead, BellSouth merely quotes the Commission's statements that it may take certain enforcement action under section 271 as support for the proposition that the Commission has exerted exclusive jurisdiction.⁹ In none of these instances, however, has the Commission directly or indirectly preempted the state commissions from ensuring ongoing BOC compliance with the obligations of section 271.

In addition to misrepresenting the Commission's statements about its own actions under section 271, BellSouth disregards clear statements by the Commission that it intends to share responsibility with the states to ensure ongoing BOC compliance with section 271. Of particular note is the Commission's discussion of section 271(d)(6) in granting BellSouth 271 authority in Tennessee: "Working with each of the state commissions, we intend to monitor closely BellSouth's post-approval compliance to ensure that BellSouth does not 'cease to meet any of the conditions required for [section 271] approval.'"¹⁰ Furthermore, in requiring BellSouth to file its monthly state reports, the Commission declared its "confiden[ce] that cooperative state and

⁸ BellSouth Petition at 1.

⁹ BellSouth Petition at 13 (citing *Triennial Review Order* ¶ 664, "Whether a particular checklist element's rate satisfies the just and reasonable pricing standard of section 201 and 202 is a fact-specific inquiry that the Commission will undertake in the context of a BOC's application for section 271 authority or in an enforcement proceeding brought pursuant to section 271(d)(6).").

¹⁰ In the Matter of Application by BellSouth Corporation, BellSouth Telecommunications, Inc., and (continued....)

federal oversight and enforcement can address any backsliding that may arise with respect to BellSouth's entry into [the long distance market in] Florida and Tennessee."¹¹ The Commission has required the same filings of other BOCs and expressed similar confidence in the cooperation with those state commissions in enforcing section 271. These statements indicate that the Commission not only views the states as having a role in this process, but that it highly values that role. It certainly evinces no intent to preempt the states from ensuring BOC compliance with the competitive checklist.

While the Commission is charged with making the final determination as to whether a BOC satisfies section 271,¹² the states are granted considerable authority to conduct proceedings, gather data, and make findings in order to make a recommendation to the Commission as to whether section 271 authority should be granted to a BOC. BellSouth argues that only two procedural mechanisms are available for ensuring checklist compliance – approval of the application, and post-entry enforcement, both of which BellSouth claims are exclusive to the FCC.¹³ BellSouth ignores, however, ongoing state review of a BOC's PAP, which is fundamental to both the approval and enforcement processes. The Commission has required each BOC to formulate a sufficient PAP, and PAP results have led to state commission action in dozens of state proceedings. Thus, the state commissions are watchdogs against BOC backsliding in each of the 50 states, and the only reason that BellSouth would request in its petition that the Commission eliminate state authority over section 271 is to eliminate that

BellSouth Long Distance, Inc., for for Authorization to Provide In-Region, InterLATA Services in Florida and Tennessee, *Memorandum Opinion and Order*, WC Docket No. 02-307, ¶ 182 (rel. Dec. 19, 2002).

¹¹ *Id.* ¶ 183.

¹² BellSouth Petition at 6.

watchdog. In short, while BellSouth is correct that section 271(d)(6) allows for continued enforcement of a BOC's 271 obligations by the FCC, BellSouth fails to explain exactly what statutory provision strips the state commissions entirely of their authority to ensure ongoing compliance with obligations of the checklist.

II. State Action to Ensure Ongoing BOC Compliance with section 271 Does Not Conflict With Federal Policy and Should Not Be Preempted.

While BellSouth recognizes that the standard for determining pricing for section 271 elements is found in section 201 and 202, requiring that they be just and reasonable, it improperly asserts that state commissions have no authority to ensure that BOC rates for checklist items comply with their statutory obligations.¹⁴ BellSouth makes the bizarre claim that any state commission interpretation of whether a BOC complies with its obligations under the section 271 competitive checklist must automatically be preempted by the FCC, whether or not the state decision actually conflicts with the Commission's interpretation or action under that statute. Notwithstanding BellSouth's filing and pursuing section 271 applications in all of its states, and its continual submissions to those state commissions of evidence that it continues to apply with those obligations, BellSouth now claims for the first time that the states actually have no role to play after a long distance application has been approved. BellSouth essentially asks for preemptive preemption: the BOC asks the FCC to determine that a state commission decision must be preempted by the FCC regardless of whether it actually conflicts with an FCC determination on the merits of the issue. Because the Commission and state commissions share responsibility for ensuring ongoing BOC compliance with section 271, and because the

¹³ *Id.* at 10.

¹⁴ *Id.* at 10-11.

Commission has expressly stated its desire for state commissions to conduct oversight and closely monitor post-approval compliance with section 271, BellSouth's position cannot stand.

BellSouth further claims that state commissions have no authority to address non-251 elements within a 252 arbitration proceeding, stating that "Congress did not authorize a state commission to ensure that an agreement satisfies section 271."¹⁵ BellSouth is wrong on this point, but whether or not section 271 issues may be handled during 252 arbitrations is irrelevant in determining whether a state commission has the authority to make such determinations under section 271 at all. As discussed above, the Commission and state commissions clearly share jurisdiction under section 271. The state commission's role continues well after application approval to assess ongoing performance and prevent BOCs from falling out of compliance with section 271.

While it is true that state law may be preempted in certain circumstances should it conflict with federal policy, BellSouth is inaccurate in claiming that state authority over elements provided under 271 would thwart the policies of the *Triennial Review Order*.¹⁶ First, the *Triennial Review Order* primarily addressed requirements under section 251, and as discussed above, the Commission determined that section 271 did create a separate unbundling requirement apart from section 251. Thus, BellSouth's argument that state enforcement of that separate requirement thwarts the policies of the *Triennial Review Order* is misguided. The Commission's discussion of preemption in that order focuses on state action under section 252 and does not discuss state authority or limitation on state action under 271.¹⁷ BellSouth appears

¹⁵ *Id.* at 7.

¹⁶ *Id.* at 12-13.

¹⁷ *Triennial Review Order* ¶¶ 191-196.

to argue that the TRA's action thwarts the policies of the *Triennial Review Order* merely because it extends requirements beyond those of that order, but because the federal regulatory regime consists of the requirements of both 251 and 271, and because the TRA acted under section 271, no such conflict exists.

If a party believes a state commission has not applied the correct standard in such a proceeding, the party may then file an action with the FCC pursuant to 47 U.S.C. §271(d)(6) and the FCC will have the benefit of the detailed factual record developed by the state commission. Preemption would only occur based on a very specific set of facts, not the wholesale preemption requested here by BellSouth. BellSouth essentially asks the Commission to eliminate the state commissions' ability to ensure compliance with section 271, and this is clearly not necessary or prudent. If BellSouth or any other BOC disagrees with the substantive finding of a state commission, it may seek preemption of that particular ruling. However, there is no support for its claim that the Commission should preempt all state action under section 271.

CONCLUSION

For the foregoing reasons, ALTS urges the Commission to reject BellSouth's petition and uphold the states' authority to ensure ongoing BOC compliance with section 271 requirements. Any preemption action taken by the Commission should be limited to the individual facts of a case and not encompass the entire state role pursuant to section 271.

Respectfully Submitted,

**Association for Local
Telecommunications Services**

By: /s/

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